IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 2926 of 2007
With
CIVIL APPLICATION No. 8195 of 2007
In FIRST APPEAL No. 2926 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? NO

2 To be referred to the Reporter or not ? NO

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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SUZLON ENERGY LTD. - Appellant(s)
Versus
VISHAL EXPORTS OVERSEAS LTD. - Defendant(s)

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Appearance :
MR PM THAKKAR, SR.COUNSEL WITH MR NAVIN PAHWA WITH MR KT DAVE for Appellant.

MR MIHIR THAKORE, SR.COUNSEL WITH MR AJ YAGNIK for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 25/09/2007

CAV JUDGMENT

1. M/s.Suzlon Energy Limited, appellant

(hereinafter referred to as “original respondent”), has filed this appeal under Section 37 of the Arbitration and Conciliation Act, 1996, challenging the judgment and order dated 3.5.2007 passed by the learned City Civil Judge, Court No.12, Ahmedabad – below Notice of Motion in Civil Misc.Application NO.370 of 2007 i.e. application filed by Vishal Exports Overseas Limited - respondent in appeal and original petitioner (hereinafter referred to as “petitioner”) in this behalf. under Section 9 of the Arbitration Act. By the impugned order the learned Judge has granted ex-parte ad-interim injunction in terms of para 16(D) of the Notice of Motion.

1.1 As there is delay in filing the appeal, an application for condonation of delay was filed and delay was condoned in this behalf.

1.2 The appeal is admitted and with consent

of parties this appeal is taken up for final disposal.

2. The facts giving rise to this appeal are as under:-

2.1 Vishal Exports Overseas Limited – petitioner, is a Private Limited Company incorporated and registered under the Companies Act, 1956 having its registered office at Ahmedabad. The petitioner is engaged in Global Trading for last more than 20 years and is particularly engaged in the business of merchandise and has a status of four-star trading house. The petitioner as part of the diversification strategy, decided to foray into power generation and decided to put up Wind Power Plants. In this connection, the petitioner came in contact with M/s.Suzlon Energy Limited respondent herein.

2.2 The appellant M/s.Suzlon Energy Ltd., original respondent is a Public Limited Company incorporated and registered under the Companies Act, 1956 having its registered office at Ahmedabad. It is an Indian Multinational Company engaged in the business of designing, engineering, procurement, supply, commissioning, maintenance and services of Wind Turbine Generators.

2.3 It appears that pursuant to the discussions and negotiations, the petitioner and the respondent agreed on the terms and conditions of the Purchase Order dated 24th May, 2003, to be made by the petitioner on the respondent. On issuance of the Purchase Order by petitioner, the respondent accepted the same by applying its seal and making of the signature of the Chairman and Managing Director of the respondent.

2.4 From the record it appears that the very terms and conditions of the purchase order set out the mutual rights and obligations of the petitioner and respondent. In other words the purchase order itself is a document of contract between the petitioner and the respondent.

2.5 The very purchase order entrusted the work of supply, erection and commissioning, maintenance of 5 WTGs (Wind Turbine Generators of S66/1250 KW) at Village Pohra, District Jaisalmer, Rajasthan Rs.21,00,00,000/- (Rupees Twenty One Crore only) and to Suzlon Infrastructure Private Limited, for the services of erection, installation of one 5 WTGs at Rs.3,25,00,000/- (Rupees Three Crores Twenty Five Lacs only). From the record it appears that the said site selection for commissioning of the WTG at a particular place Village Pohra, District Jaisalmer in the State

of Rajasthan was done by the experts of respondent and the land for the site was given on long term lease to petitioner by respondent. The land required for the project was given on sub-lease by Suzlon Developers Private Limited an associate concern of the respondent having the very land on lease with the prior permission of the Department of Revenue, State of Rajasthan, who has actually leased the land to the sister concern of the respondent. Thereafter the work of development of land and site, foundation and civil work, erection and commissioning of WTG and electrical, substation and/or pooling charges to be paid to Rajasthan Vidyut Prasaran Nigam Limited (RVPNL) and/or Rajasthan Renewable Energy Corporation Limited (RRECL) and all other site related works and expenses was entrusted by the petitioner under the instructions of respondent to respondent's group company – Suzlon Developers Private

Limited.

2.6 The Purchase Order agreement provided for, inter alia, the scope of supply, terms of payment, time for completion, power curve performance, annual net metered energy Generation Guarantee, machine availability guarantee and other terms and conditions.

2.7 The important clause is clause 14 which provides for arbitration and Clause 18 which provides important terms and conditions of operations and maintenance service which reads as under:

> “Clause 14. If at any time any question, any dispute and/or differences whatsoever shall arise between the parties to this contract due to any special conditions of this contract or in connection with this

contract, and failing amicable settlement the same shall be referred to an arbitrator under the Indian Arbitration and Reconciliation Act, 1998 or any statutory modifications for the time being in force and such arbitration shall take place at Ahmedabad."

"Clause 18 - Operations and Maintenance Service:

You will provide free Operation, Maintenance & Security with spares and consumables for the first year of operation. You would also arrange to provide complete O&M Services after the expiry of the warranty period, for which we may enter into a separate contract with Suzlon Wind – Farm Services (Private) Limited at a later date as per O & M rates for 1 WTG

specified below:

1.First year : Free.

2.Second year : Free O&M MBD to be taken by us.

3.For 3rd year to

6th year : Rs.25,00,000/- Per Year @ Rs.5,00,000/- (Rupees Five Lacs Only) per WTG per Year payable by us in the beginning of the year. This extended warranty should take care of all breakdowns, replacements, and/or repairs of spares, parts and components during the extended warranty period.

O&M Charges would be paid by us to you @ Rs.0.12 per kWh (Unit) from the 3rd year with annual increase of Rs.0.01 per kWh from 4th year up to 6th year.

Fire and allied Perils & burglary insurance from the First Year onwards

would be taken by us.”

2.8 As per the contract, the petitioner has paid to the respondent an amount of Rs.16,85,00,000/- (Rupees Sixteen Crores Eighty Five Lacs only) being the suppliers credit/security deposit was retained by the petitioner as per the contractual term to be paid over a period of three years out of the generation of net metered energy receipts. The amount has since been adjusted by the petitioner against the amounts due on account of short generation of net metered energy. The amount adjusted is in proportion to the shortfall in generation of electricity as per the mutually accepted calculation stipulated in the contract as well. For example in the first year the shortfall in generation was 56,80,856 units and the revenue loss calculated at Rs.3.32/- per unit aggregated to Rs.1,88,60,441/-. The unit rate of Rs.3.32 was

the then purchase rate at which RRVPNL paid the petitioner for the supply of energy.

2.9 The petitioner also paid Rs.3,25,00,000/- (Rupees Three Crore Twenty Five Lacs only) to Suzlon Infrastructure Private Limited, respondent's sister company towards erection and commissioning services.

2.10 After the installation of Five Wind Turbine Generators at the sites selected by the respondent, under the Purchase Order Agreement and after reviewing the performance of WEG's after a stipulated of one year, the petitioner found that there was substantial shortfall in the net metered generation of electricity. The shortfall per WTG was found to be more than 56,80,856 units. In other words, instead of 25 lakh units per year per WEG/turbine, each turbine generated less than 11.36 lacs units of electricity in the entire

year. In terms of percentage the shortfall was 45.44% in the first year. By any stretch, this was not a minor anticipated variation but a very shocking and surprising substantial shortfall in generation of electricity having unbearable and adverse financial and other consequences. The petitioner drew the attention of the respondent by writing various letters about such shortfall and sending debit note for the amount calculated by applying the RRVPNL rate under Power Purchase Agreement with the shortfall units in the net metered generation and ultimately adjusted the same against the amount of suppliers credit outstanding in its books in accordance with Clause 5D and Clause 12 of the Purchase Order Agreement. The respondent company on the completion of the first year did not object to the same nor controverted the same. On completion of one year and on coming to know about the substantial shortfall in generation

of net metered electricity, the petitioner company stopped making payment of interest on the suppliers credit. The respondent company did not object obviously because it was at the receiving end as its written assurances and guarantees were being proved otherwise. Moreover, the respondent company did not ask for the repayment of the suppliers credit as per the schedule laid out in the purchase order, as the purchase order provided for the same out of the net proceeds of the electrical energy sold to RRVPNL which now as not matching the guaranteed generation.

2.11 On the review of the performance of the wind turbine generators after the completion of first year of installation, responding to such a drastic shortfall in generation, the respondent company requested the petitioner to wait for another two year and in total for the completion of three years from the date of

installation of WTG, so that performance of the wind turbine generators could be evaluated and a mutually acceptable solution could be worked out.

2.12 Unfortunately, the generation for the second and third year also did not meet the guaranteed generation levels and accordingly the petitioner raised debit notes for the shortfall in the generation and adjusted the same against the suppliers credit outstanding in its books. The respondent company also did not object to the debit notes nor asked for the suppliers credit installments falling due at the completion of second and third year.

2.13 The short fall for the second year was 53,93,176 units and for the third year the short fall was 40,03,035 units respectively. The short fall in terms of monetary value was Rs.1,82,28,934/- (Rupees One Crore Eighty Two

Lacs Twenty Eight Thousand Nine Hundred Thirty Four Only) for the second year and Rs.1,38,10,470/- (Rupees One Crore Thirty Eight Lacs Ten Thousand Four Hundred Seventy Only) for third year respectively calculated at the RRVPNL power purchase rates for the respective years. The total loss at the end of the three years comes to Rs.5,08,99,845/- (Rupees Five Crores Eight Lacs Ninety Nine Thousand Eight Hundred Forty Five Only).

2.14 The shortfall in generation of net metered energy for the three completed years since commissioning on 30th September, 2003, is summarized as below:

1	2	3	4	5
Year	Guaranteed Net Metered Generation for 5 WTGs	Actual Net Metered Generation for 5 WTGs	Shortfall in Generation Units (2-3)	Short fall Amount receivable on account of Shortfall
2003-2004	1,25,00,000	68,19,144	56,80,856	1,88,60,441
2004-2005	1,25,00,000	71,06,824	53,93,176	1,82,28,934

1	2	3	4	5
2005-2006	1,25,00,000	84,96,965	40,03,035	1,38,10,470
Total	3,75,00,000	2,24,22,933	1,50,77,067	5,08,99,845

2.15 It appears that the shortfall of generation of electricity is due to various reasons. However, the respondent had from time to time assured to the petitioner that the shortages would soon cease and the wind farm would generate net metered energy as per the unconditional guarantee given in the purchase order. Thereafter various meetings took place between the parties somewhere in June 2005. Thereafter the petitioner also addressed a letter dated 14th October, 2006, requesting the respondent to convene a meeting to resolve the long pending issue of shortfall in generation of the wind farm. The petitioner also sent a reminder on 24th October, 2006, to the respondent calling for a meeting and also demanded the net payment owned by the respondent after adjusting the

suppliers credit/security deposit against the shortfall in generation for the three years. Thereafter meeting took place between the petitioner and the respondent in the month of November 2006 for resolving the manner in which the shortfall in generation suffered by the petitioner would be resolved as well as the remedial provision for the expected future shortfall in generation for the next 17 years.

2.16 On 19th December, 2006, the petitioner informed the respondent of having appointed M/s.Septett Advisory Services Pvt. Limited as its consultant who would be acting on its behalf and under its advice to negotiate with the respondent the settlement process. The petitioner addressed a letter dated 29th December, 2006, to the respondent in connection with the settlement of shortfall during the period of October 2003 - September 2006 for 6.25 MW Wind Farm Project at Village

Pohra in Jaisalmer District of Rajasthan.

2.17 A meeting was held at Mumbai on 29th December, 2006, with the representatives of Suzlon and Septett Advisory acting on behalf of VEOL. Minutes of the meeting was duly drawn and it was decided to meet one again around 15th January, 2007, to discuss and finalize the long pending issue.

2.18 The petitioner vide its letter dated 27th January, 2007, seriously disputed and negated the complete turnaround of the respondent on the issue of absolute generation guarantee and the other factors put forward by the respondent for the short generation. The petitioner also asked them to substantiate the various reasons ascribed for the shortfall in generation, in addition to reconciliation of the accounts.

2.19 The petitioner representatives also met the official of respondent company in New Delhi on 9th February, 2007, to discuss out the points arising in the above two correspondents dated 25th January, 2007 and January 27, 2007. The petitioner further sent reminders to the respondent on February 12, 2007, seeking the submission of the various documents requested vide its letter dated 27th January, 2007. The respondents sent only the statement of accounts as per their books on February 13, 2007.

2.20 Most unfortunately, the respondent on April 16, 2007, sent a demand notice to the plaintiff seeking the release of the outstanding amount as per the books within 7 days failing which intending to initiating legal action and discontinuance of operation and maintenance services for the wind turbine generator.

3. Being aggrieved and dissatisfied with the aforesaid action, the petitioner filed a petition under Sec.9 of the Arbitration Act with various prayers. However, prayer 16(d) the relevant paragraph which is to be quoted as under:

3.1 “Pending commencement and conclusion of the arbitral proceedings and till the enforcement of the award resulting therefrom, the Hon'ble Court be pleased to grant an interim injunction restraining the respondent from discontinuing the operation and maintenance services to wind turbine generators erected at Village Pohra, District Jaisalmer Rajasthan by acting upon or implementing their letter dated 16th April, 2007, or even otherwise and be further pleased to

pass an interim mandatory order directing the respondent to continue to provide operation and maintenance services to the aforesaid wind turbine generators at no extra costs."

3.2 Thereafter the matter was presented before the trial Court, and as indicated above, the trial court passed the following order:

3.2A Considering the facts of the present case, and considering the hardships which would affect to the citizen at large of Rajasthan State who are not made party before this Court, I am of the view that if the injunction is not granted at this stage, it would defeat the purpose of filing this application. Hence, I pass the following order:-

3.2B The interim relief in terms of para 16(D) of the NM application is hereby granted till 11.5.2007.

Meanwhile, the applicant shall produce the unconditional bank guarantee of Rs.25 lacs within four weeks from the date of this order.”

4. Being aggrieved and dissatisfied with the said order, the original respondent – appellant herein filed appeal before this Court.

5. While considering First Appeal No.2925 of 2006, I have considered various contentions in this behalf. The original respondent has reiterated and relied upon the contention which is the subject matter of First Appeal No.2926 of 2007. Over and above the learned counsel for the appellant has

submitted that the learned trial Judge ought to have appreciated that by the impugned order, the learned trial Judge has restrained the appellant-respondent from discontinuing the operation and maintenance service of Wind Turbine Generators. By the same order, the learned trial Judge has also issued mandatory directions directing the appellant to continue to provide Operation & Maintenance Service to the Wind Turbine Generators at no extra cost. The learned trial Judge ought to have appreciated that the impugned order on the face of it is without appreciating the obligations of the appellant under the Contract. The appellant is not under any obligation under the Contract to provide Operation & Maintenance Service to the Wind Turbine Generators. As per Clause 18 of the Contract, the Operation & Maintenance Service to the Wind Turbine Generators are to be provided by a separate legal entity viz.

Suzlon Wind-Farm Services (Private) Limited upon execution of a separate contract between the respondent and the said company. As a matter of fact, the appellant by itself has no infrastructure to provide Operation & Maintenance Service to the Wind Turbine Generators. The impugned order made by the learned trial Judge is therefore wholly without jurisdiction.

5.1 After relying upon Clause 18 on ground (m), they have stated as under:

5.2 A perusal of the above covenant makes it clear that after the first two years of Operation & Maintenance Services, from 3rd year onwards, the Operation & Maintenance Services was to be rendered by Suzlon Wind-Farm Services (Private) Limited and which the respondent-petitioner was obliged to enter into a separate contract. There is no

obligation on the part of the appellant-respondent to provide Operation & Maintenance Services to the respondent-petitioner after first two years of contract. As the contract was executed on 24.5.2003, the first two years of free services have already expired in the year 2005. After the year 2005, there is no obligation on the part of the appellant-respondent to provide Operation & Maintenance Services to the respondent. In the circumstances, the impugned order made by the learned trial Judge is completely beyond the scope of terms of contract. The impugned ex-parte injunction order in fact tantamount to re-writing terms and obligations of the parties under the contract which is not permissible in law. The learned trial Judge therefore has grossly erred in making the impugned order ex-parte injunction order.

5.3 The learned counsel submitted that the

learned trial Judge ought to have appreciated that as a matter of fact the subject matter of the application made under Sec.9 of the Act refers to certain claims of the respondent which are based on the interpretation of Clause 12 of the Contract. There is no claim of the respondent arising from any of the obligations under Clause 18 of the Contract which provides for Operation & Maintenance Services. In fact, a bare perusal of Clause 18 of the Contract would demonstrate that there is no obligation on the part of the appellant beyond first two years of contract which has already expired in May 2005. In fact, any claim with respect to Operation & Maintenance Services would lie only against Suzlon Wind-Farm Services (Private) Limited and that too in proceedings which would not be the subject matter of Sec.9 proceedings inasmuch as, as of now there is no arbitration agreement between the

respondent and Suzlon Wind-Farm Services (Private) Limited. Accordingly, the learned trial Judge grossly exceeded in his jurisdiction while entertaining the prayer of the respondent with respect to Operation & Maintenance Services against the appellant. As a matter of fact, considering the obligations under Clause 18 of the Contract, the learned trial Judge has acted completely without jurisdiction while making the impugned order against the appellant.

5.4 The learned counsel further submitted that the learned trial Judge ought to have appreciated that in view of the terms and obligations of Contract, it is clear that there is no obligation on the part of the respondent to perform any obligations with respect to Operation & Maintenance Services. The grant of injunction tantamounts to compelling the appellant to perform

obligations when there exists no obligation on the part of the appellant under the Contract. The learned trial Judge ought to have appreciated that in absence of any contract which can be enforced against the appellant for Operation & Maintenance Services it was wholly improper on the part of the learned trial Judge to have granted the impugned injunction in favour of the respondent-petitioner.

5.5 The learned counsel further submitted that the learned trial Judge ought to have appreciated that there is in fact no contract in respect of Operation & Maintenance Services with the appellant and therefore no relief as to Operation & Maintenance Services against the appellant can be granted. As there is no Operation & Maintenance Service contract with the appellant, there is no question of

enforceability of any right in favour of the respondent. In other words, there is no contract between the parties for which specific performance can be granted by the Court. The impugned order made by the learned trial Judge therefore also is legally unsustainable.

6. In this behalf all the contentions which has been considered but additional contentions which has been referred in the earlier matter has great bearing in this behalf. That in this case the trial court granted injunction to a party who is not a party to the subject matter of arbitration that is the additional contention has been taken in this behalf and for that purpose I have considered the definition of Arbitration Agreement particularly Sec.2(b), Sec.7, Sec.8 and Sec.9 of the Arbitration Act, which reads as under:

"Sec.2(b) "arbitration agreement" means an agreement referred to in Section 7."

6.1 Sec.7 of the Act which provides as under:

6.1A **"7. Arbitration agreement**.-- (1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in--

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

6.1B I have considered Section 8 of the Act which provides power to refer parties to arbitration where there is an arbitration agreement. Sub-sec (1) of Sec.8 provides a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement of the substance of the dispute, refer the parties to arbitration. Sub-sec.2 of Sec.8 provides the application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. Sec.9 provides interim measures, etc. by court which provides that a party may, before, or during arbitral proceedings or at any time after the making of the arbitral award or for an interim measure of protection in respect of any of the

matters in connection with the arbitration.

6.1C In view of the conjoint reading of Sec.2(b) with Sec.7 and Sec.8 of the Act, the Court has no power to grant any order against the party who is not a party to an arbitration agreement. In support of the same, this Court relies upon the order dated 11.1.1007 passed by this Court (Coram: K.M. Mehta, J.) in Special Civil Application No.27056 of 2006 in the case of Guardian International Corporation vs. Gujarat Alkalies and Chemicals Limited. It may be noted that in that case also the trial Court granted injunction against the party who is not a party to the arbitrator. The Court also considered Sec.2(a) and Sec.7 of the Act also. The Court has also considered Sec.8 of the Arbitration Act also. The Court has also considered the judgment of Kerala High Court in the case of **Shoney Sanil vs. Coastal**

Foundations (P) Ltd., reported in 2006(4) ALR 294. Thereafter the Court considered that as in this case injunction was granted against the party who is not a party to the arbitrator and still the trial court granted injunction against the said party where the party who is not a party to the arbitrator filed a Writ Petition before this Court and this Court in para 6 has observed like this:

> "As regards interim relief, as there was an inherent lack of jurisdiction by trial Court while passing the order under Sec.9 of the Act, this Court therefore suspend the order of the trial court passing the order under Sec.9 of the Act. The stay order was granted till 11.1.2007 and the matter was kept for further hearing on 9.1.2007."

7. In view of all these principles and in view of the reasonings given by this Court in First Appeal No.2925 of 2007 and on this additional ground that when the trial Court passed the order to a party which is not the subject matter of the agreement also the order is bad in law. In view the same, the appeal is required to be allowed. Hence the appeal is allowed. The impugned order of the trial court is quashed and set aside. After the appellant - original respondent will file reply in this matter, the trial Court will hear the matter and pass the order in accordance with law. It may be noted that as regards Suzlon Infrastructure, who is not a party to the contract, the Court could not have granted any relief against the party in this behalf.

8. In view of the same, civil application is allowed. Prayer in terms of para 6(B) is

granted. Accordingly Civil Application No.8195 of 2007 stands disposed of with no order as to costs.

(K.M. Mehta, J.)

9. After pronouncement of the judgment Mr.A.J. Yagnik, learned advocate for original petitioner, respondent herein, prays that this Court may not allow to operate or to implement the final judgment and order passed by this Court in this behalf. Mr.A.J. Yagnik, learned advocate, prays that he may be given two weeks time to approach the Hon'ble Apex Court as injunction which was granted from 4.5.2007 is continued till today. According to him, in this case the original petitioner had filed an application under Section 9 of the Arbitration Act on 4.5.2007 and the trial Court has granted ex-parte ad-interim injunction on that day. On that day onwards, injunction is still

operated, though appeal was filed and Civil Application was also filed. However, there was no interim order passed by this Court on civil application in view of the fact that the matter was heard finally. So till today the ad-interim injunction order granted by the trial Court is continued and operated.

10. On the other hand, Mr.P.M.Thakkar, learned Senior Counsel with Mr.Navin Pahwa, learned advocate, appears on behalf of original respondent who is appellant herein strongly objects to the same. The learned counsel submitted that their submission is that order of the trial Court is contrary to and inconsistent with the provisions of Order 39 Rule 3 of the CPC. The learned counsel further submitted that it is no doubt true that they have filed appeal and the Court condoned the delay and thereafter due to exigency of time the matter was heard partly

and adjourned to some other occasion due to difficulty of the learned senior counsel appearing for both the sides and partly because this Court was busy with other part heard matters.

11. In the facts and circumstances of the case when the original petitioner desires to approach the Hon'ble Apex Court, the implementation and execution of this order is stayed upto 11.10.2007. There will not be any further extension of time.

Date: 25.9.2007 (K.M. MEHTA, J)

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